

The Law of Trusts EDITED BY GERAINT THOMAS AND ALASTAIR HUDSON [Oxford: Oxford University Press, 2004. clxxxix + 1907 pp. Hardcover: £195]

The competition for trusts texts has never been so keen, with ever more titles being added to the shelves. *The Law of Trusts* represents the latest addition to the library of practitioner trusts texts. In a field dominated by *Lewin on Trusts* (2000), now in its 17th ed., and *Underhill and Hayton: Law Relating to Trusts and Trustees* (2003), now in its 16th ed., the latest offering by Oxford University Press offers a twist to the traditional trusts text. In addition to setting out the general principles of trusts law, *The Law of Trusts* also seeks to apply those principles to the various types of modern trusts. To this end, the 1907 page text is divided into two sections: the first, and slightly larger, half is devoted to setting out the general principles of trusts law; the second focuses on the various specific guises adopted by modern trusts.

Like its brethren, *The Law of Trusts* begins with the unenviable task of attempting a definition of the trust. In this respect, it fares no better than the many other attempts before and one wonders if there is any point in attempting to define precisely the concept of a trust given its fluid nature. There are so many different rules for so many different circumstances that it is arguable whether there is one single concept or many related ones: see, e.g., McBride, "On the Classification of Trusts" in Birks and Rose (eds.), *Restitution and Equity* (2000) Vol. 1, 23 at 23-4. Take the opening sentence of Chapter 1 (at 13): "The essence of a trust is the imposition of an equitable obligation on a person who is the legal owner of property (a trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the beneficiary) who has a beneficial interest recognized by equity in the property." It is trite law, of course, that a trustee need not hold legal title; an equitable title will suffice. Further, insofar as it is suggested that the essence of the trust is an equitable obligation imposed upon a trustee, this seems to be contradicted by the well-established rule that an express trust will not fail for want of a trustee. The definition also fails to take into account charitable purpose trusts. In some cases, the label trust is even applied where the "trustee" holds no property on trust for the beneficiary, as in the case of accessory and receipt liability. In yet other cases, a recipient may hold property subject to the beneficiary's interest but not be under a personal obligation to account for the property: e.g., a donee of property transferred in breach of trust will not be under any obligation until the requisite knowledge of the breach is acquired but until then will nevertheless be regarded as holding the property subject to the beneficiary's interest. In the case of anomalous non-charitable purpose trusts, also known as trusts of imperfect obligations, the trustee's obligation is practically enforceable only in a negative rather than positive manner so that, practically, they bear a greater resemblance to powers than trusts, though they are not so regarded theoretically.

Eight chapters are devoted to the "Express Private Trusts", not including 15 chapters setting out the "The Duties and Powers of Trustees" and a further three dealing with "Breach of Trust". The remaining six chapters of Section One of the text are devoted to "Trusts Implied by Law", a diverse heading including resulting trusts, constructive trusts, as well as third party liability. For the most part, the text of Section One is good and sometimes even more scholarly than would be expected of

a practitioner's text. However, there appear to be a small number of curious editorial decisions, omissions and infelicities.

For example, quite curiously, sham trusts are discussed (at para. 1.32) under the heading "C. Forms of Express Trust" in Chapter 1: "The Nature of the Trust" instead of the arguably more logical setting of "Certainty of Intention" in Chapter 2: "The Three Certainties". The bulk of Chapter 2 is devoted to a discussion of "Certainty of Intention" with much of the text devoted to helping the reader distinguish between cases where a donor intended an "Absolute Gift or Trust". Considering the objectives of the authors in setting out a modern account of trusts law, it seems distinctly odd that the arguably more significant issue of distinguishing between whether contracting parties intended to create a debtor-creditor or a trustee-beneficiary relationship is here absent. There is also the curious omission of any substantive discussion of disclaimer of trusteeship despite the dedication of the whole of Chapter 17 to "Disclaimer, Release, and Extinguishment of Powers".

Any chapters on "Trusts Implied by Law", here found in Part D, will always be difficult given the nature of the subject. The key to this difficult topic lies in setting out the law whilst maintaining a balance between divergent views, though without sacrificing one's own voice. In this respect, the text here is somewhat lacking. Given the strong reliance on Lord Browne-Wilkinson's much criticised judgment in *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1996] A.C. 669 throughout the text, the conspicuous absence of any of the critiques of his lordship's treatment of "conscience" in that case (see, e.g., Millett (1998) 114 L.Q.R. 399; Birks [1996] R.L.R. 3; Swadling (1998) 12 T.L.I. 228) is disconcerting. The contributor also seems to have read too much into at least one aspect of his lordship's decision. Lord Browne-Wilkinson (at 715-716) had suggested that a thief may be considered a constructive trustee despite the well-established rule that a thief acquires no title from the owner of the stolen property by the operation of the rule *nemo dat quod non habet*, though it is clear from his judgment that this was only for the limited purpose of permitting the then perceived to be more generous rules of tracing in equity to be applied in favour of the owner of the stolen property. Instead of recognizing this, the contributor (at paras. 27.21-27.23; 27.53-27.56) sets up trusts law against commercial law by suggesting that they somehow conflict!

Leaving aside the general trusts principles set out in Section One of the text, the likely selling point for *The Law of Trusts* is, in any event, likely to be Section Two on "Specific Trusts". Comprising 24 chapters divided into six parts, it is this section of the text that is being relied upon to set itself apart from other trusts texts. It came as a surprise to this reviewer how much of the material in these chapters can actually be found in traditional trusts texts, such as Chapter 41: "International Trusts: Choice of Law" and Chapter 57: "Trusts of Land". The basic material of Chapter 56: "Trusts of the Family Home" will also be included in most trusts texts under the topics resulting trust, common intention constructive trust and, perhaps to a lesser extent, proprietary estoppel. To a certain extent, the same material is also to be found in Section One of the text under the relevant chapters so there is a fair amount of duplication, though the advantage in a chapter such as Chapter 56 is that it draws together the separate topics and provides a contextual setting to the discussion.

Almost half of Chapter 49: "Trusts Used to take Security in Commercial Transactions" is comprised of a discussion of the *Quistclose* trust, which will be found in any

traditional trusts text (indeed also in Section One). Much of the material in Chapter 52: "Investment of Private Express Trusts" will also be found in traditional trusts texts, focusing as it does on an express trustee's powers of investment. Chapter 54: "Fiduciary Liability in the Creation of Financial and Commercial Transactions" and Chapter 55: "Trusts and the Termination of Contracts" seem a little out of place in Section Two of the text as neither topic seems particularly concerned with "Specific Trusts". Much of the discussion in either chapter can be found in traditional trusts texts, though without the benefit of the contextual setting and focused discourse that these separate chapters are able to provide.

All of which leaves perhaps too little that is unique to this text. "Private Client Trusts" receives a four chapter treatment which is of questionable breadth and depth. The short discussion of letters of wishes (at para. 36.04) in Chapter 36 "Discretionary Trusts and Disabled Trusts" is obviously inadequate. There is no discussion of whether or not such letters may be viewed by beneficiaries who wish to do so except for a single sentence, not in this chapter but in Chapter 12 (at para. 12.19A), referring to a single authority, *Hartigan Nominees Pty. Ltd. v. Rydge* (1992) 29 N.S.W.L.R. 405. Nor is there any discussion of whether or not these letters may post-date the trust or even be varied from time to time by the settlor. Neither is there any reference to particular species of private client trusts such as the Red Cross trust, which whilst lamentable in a general trusts text (see, e.g. Penner (2002) 16 T.L.I. 70 at 71, reviewing the 17th ed. of *Lewin on Trusts*), seems almost inexcusable in one purporting to cover specific trusts as one of its primary agenda. "International Trusts" comprise four chapters excluding the aforementioned Chapter 41. One chapter, Chapter 42: "Jurisdiction, Remedies, and the Recognition and Enforcement of Foreign Judgments" covers an aspect of English private international law that is barely touched upon in the leading trust texts, with the remaining three chapters focused on "Offshore Asset Protection Trusts", "Offshore Purpose Trusts" and "The Cayman Islands' STAR Trust; The British Virgin Islands Special Trusts Act 2003". "Occupational Pension Scheme Trusts" are covered in four chapters. "Trusts in Financial Transactions" comprises five chapters excluding the aforementioned Chapter 52. Of these, "D. Collateralization and Property-Based Security in Complex Financial Transactions" in Chapter 49: "Trusts Used to Take Security in Commercial Transactions" is unexpectedly brief. There is also a Chapter 53 on "Trusts Which Conduct a Business". Practitioners in Singapore interested in a discussion of Real Estate Investment Trusts ("REITs") will find no such discussion in the text as REITs are still in an embryonic state of development in the United Kingdom: see *U.K. Real Estate Investment Trusts: A Discussion Paper* (2005) at <http://www.hm-treasury.gov.uk/media/A61/AB/Bud05Reits.pdf>.

As a general trusts text, *The Law of Trusts* is more than perfectly serviceable but a few niggling bits prevent it from being considered spectacular. This makes it, as a new entry to the market, unlikely to pose a serious challenge to the current leading texts on the basis of Section One alone. Reading it as a specialist text, this reviewer was somewhat disappointed at how much of the second section of the text is already covered in traditional texts, though this may have been the result of unduly high expectations. Anyone interested in those specific trusts will be well advised that only roughly a third or less of the entire text can properly be regarded as providing an insight into specific areas not covered by the leading texts. While the idea behind

The Law of Trusts is laudable, the execution falls just short of deserving a whole-hearted recommendation. It can only be hoped that a second edition of the text will address some of these concerns.

KELVIN F.K. LOW
University of Hong Kong